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No. 09-87

Supreme Court, U.S.
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In The

Supreme Court of the United States

GINGER MARTINEZ, individually and as Personal Representative of the Estate of Kenneth Wayne Ginn,

Petitioner,

v.

DeWAYNE BEGGS, as Sheriff of Cleveland County; DAVID EPPS; KEVIN BRANDON; CLEVELAND COUNTY BOARD OF COUNTY COMMISSIONERS; TOMMY EDWARDS; GILBERT KIRKLAND,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the county can be held liable under 42 U.S.C. § 1983 for its own unconstitutional conduct when there has been no underlying violation of the United States Constitution by any officer.

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42 U.S.C. § 1983 .....*passim*

REPLY BRIEF FOR PETITIONER

THERE IS A CONFLICT AMONG THE COURTS AS TO WHETHER A COUNTY CAN BE LIABLE FOR VIOLATING AN INDIVIDUAL'S CONSTITUTIONAL RIGHTS WHERE THERE IS NO UNDERLYING CONSTITUTIONAL VIOLATION BY ANY OF ITS OFFICERS

The respondents' brief in opposition underscores the need for review by this Court. One of the primary assertions of respondents' brief is that "there is no conflict" among the courts of appeals with regard to the requirement that there be an underlying constitutional violation before a county or municipality can be held liable under 42 U.S.C. § 1983. Br. in Opp. 3.

The petitioner certainly agrees that there must be a constitutional violation of the detainee's rights before the county can be held liable. However, the petitioner asserts that there should not be a requirement that an individual officer commit an underlying constitutional violation in order to hold the county liable. The county should be held liable for its own conduct without regard to whether an individual employee's conduct was unconstitutional. The county's liability should not depend upon the liability of any deputy or officer of the county. This Court has previously held that a municipality may be liable even if liability cannot be ascribed to a single individual officer. *Owen v. City of Independence,* 445 U.S. 622, 652 (1980) (a "systemic injury" may "result not so much from the conduct of any single individual, but from the interactive behavior of several

government officials, each of whom may be acting in good faith.").

The petitioner is attempting to draw a distinction between the independent liability of the county for the constitutional violation of an individual's rights as opposed to liability because a deputy or officer violated the constitutional rights of an individual.

The respondents specifically state that the opinion of the Tenth Circuit is consistent with all other courts of appeals decisions around the country. Br. in Opp. 4. To the contrary, the courts are not entirely consistent. In fact, the Third Circuit Court of Appeals clearly states that "[i]t is possible for a municipality to be held independently liable for a substantive due process violation even in situations where none of its employees are liable. *Fagan v. City of Vineland,* 22 F.3d 1283, 1292 (3d Cir. 1994) (*Fagan I*)." *Brown v. Commonwealth of Pennsylvania, Dept. of Health Emergency Medical Services Training Institute*, 318 F.3d 473, 482 (3d Cir. 2003). The court further commented on the split of authority at note 3:

> We note that there is a split among the courts of appeals on this issue. Some courts have explicitly rejected our holding in *Fagan I*. *See Trigalet v. City of Tulsa*, 239 F.3d 1150, 1154-55 (10th Cir. 2001), *cert. denied,* 534 U.S. 814, 122 S.Ct. 40, 151 L.Ed.2d 13 (2001); *Young v. City of Mount Rainier*, 238 F.3d 567, 579 n. 9 (4th Cir. 2001); *Evans v. Avery*, 100 F.3d 1033, 1040 (1st Cir. 1996); *Thompson v. Boggs,* 33 F.3d 847, 859 n. 11

(7th Cir. 1994). One panel of this court has even questioned the panel opinion in *Fagan I. See Mark v. Borough of Hatboro,* 51 F.3d 1137, 1153 n. 13 (3d Cir. 1995). But other courts have agreed with our opinion in *Fagan I. See Fairley v. Luman,* 281 F.3d 913 (9th Cir. 2002), *petition for cert. filed,* 537 U.S. 1044, 123 S.Ct. 659, 154 L.Ed.2d 515 (2002) (No. 01-1882).

To establish municipal liability under § 1983, a Plaintiff must show that a constitutional violation was committed pursuant to an official custom, policy, or practice of the governmental entity. *Monell v. N.Y. Dep't of Soc. Servs.*, 436 U.S. 658, 690-92 (1978). There are two basic circumstances under which municipal liability will attach: (1) where a particular municipal policy or custom itself violates federal law, or directs an employee to do so; and (2) where a facially lawful municipal policy or custom was adopted with "deliberate indifference" to its known or obvious consequences. *Seymour v. City of Des Moines*, 519 F.3d 790, 800 (8th Cir. 2008). There need not be a finding that a municipal employee is liable in his or her individual capacity before municipal liability can attach. *Speer v. City of Wynne*, 276 F.3d 980 (8th Cir. 2002); *Parrish v. Luckie*, 963 F.2d 201, 207 (8th Cir. 1992) ("A public entity or supervisory official may be held liable under § 1983 even though no government individuals were personally liable.").

In *Fairley v. Luman*, 281 F.3d 913, 916 (9th Cir. 2002), the court explicitly rejected a municipality's

argument that it could not be held liable as a matter of law because the jury had determined that the individual officers had inflicted no constitutional injury. "If a Plaintiff established he suffered constitutional injury *by the City*, the fact that individual officers are exonerated is immaterial to liability under § 1983." *Id.* (Emphasis in original); *see also Hopkins v. Andaya*, 958 F.2d 881 (9th Cir. 1992).

The respondents, at Br. in Opp. 4, rely on *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) (if officer acted constitutionally, city cannot be held liable; a municipality cannot be held liable under § 1983 in the absence of an underlying constitutional violation.). In *Speer* at 985-986, the court offered this analysis of *Heller*:

> Our court has previously rejected the argument that *Heller* establishes a rule that there must be a finding that a municipal employee is liable in his individual capacity as a predicate to municipal liability. *See Praprotnik v. City of St. Louis,* 798 F.2d 1168, 1172-73 n. 3 (8th Cir. 1986), *rev'd on other grounds,* 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988); *see also Parrish v. Luckie,* 963 F.2d 201, 207 (8th Cir. 1992) ("A public entity or supervisory official may be liable under § 1983, even though no government individuals were personally liable."). As our court noted in *Praprotnik,* a crucial fact underlying the Supreme Court's decision in *Heller* was that the theory of municipal liability asserted was entirely dependent on

> the municipal defendants' responsibility for the officer's alleged unconstitutional acts. *See Praprotnik,* 798 F.2d at 1173 n. 3. A favorable verdict for the individual officer, therefore, would have been entirely inconsistent with a finding that the municipal defendants were responsible for the unconstitutional behavior. [Footnote omitted] *Heller* should not be read to require a plaintiff to show more than that a governmental policy or custom was the "moving force" that led to the deprivation of his constitutional rights, the foundation for municipal liability recognized by the Court in *Monell v. N.Y. Dep't of Soc. Servs.,* 436 U.S. 658, 694, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). [Footnote omitted].

CONCLUSION

If an individual's constitutional rights are violated by the county's deliberate indifference to the dangers of alcohol intoxication and the county implements inadequate policies and fails to properly train its deputies, and thereby causes injury to the detainee, the county should be held liable. There is no reason to require that an individual officer commit a constitutional violation before a county can be held liable. This is an opportunity for the Court to bring clarity to this constitutional issue and obtain uniformity in the decisions of the lower courts.

The petition for a writ of certiorari is well-founded and should be granted.

Respectfully submitted,

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